OPINIONS BELOW

The unpublished opinion of the Court of Appeals for the Fifth Circuit was filed on November 4, 2005. (App. A). The unpublished order and reasons of the District Court for the Eastern District of Louisiana was filed on July 19, 2004. (App. B).

JURISDICTION

The United States Court of Appeals for the Fifth Circuit denied a timely petition for rehearing on December 6, 2005. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

1. Operative Facts

This matter involves an attempt by Fracht to obtain equitable indemnity from LCI, the successor to Forest Lines, for liability imputed to Fracht for damage to cargo owned by Mueller Weingarten AG (Mueller) caused by Forest Lines' breach of its duty as a common carrier to properly load and stow the cargo it had undertaken to transport. Mueller had sold an automotive manufacturing press to General Motors under terms obligating it to arrange ocean transport from Germany to the United States. Mueller hired Fracht, a German freight forwarder, to make the arrangements. Fracht, acting as a fixed cost freight forwarder, arranged for LCI's predecessor, Forest Lines, to carry the cargo consisting of 6 packages. Forest Lines then failed to have the cargo properly secured with the result that the cargo shifted during transit sustaining damages of nearly $1,000,000. Muller's cargo insurer, Allianz Versicherungs AG (Allianz), paid Muller for the loss, thereby becoming subrogated to the latter's cargo damage claim.

Allianz filed suit against Fracht in Germany on the ground that Fracht was a fixed cost freight forwarder and, as such, liable to the same extent as the actual carrier, Forest Lines. Fracht defended on the grounds that it was not a fixed cost freight forwarder and, alternatively, that, under the bill of lading Forest Lines had issued to Muller, its liability was limited by the $500 per package limit of the United States Carriage of Goods by Sea Act (COGSA).[2] The German court found Fracht to be a fixed cost freight forwarder and, as such, liable for the full amount of the loss, even though Fracht was free from fault and indeed was not involved in any aspect of the carriage itself. That holding was based on the fact that, as observed by the Fifth Circuit opinion, a fixed cost freight forwarder occupies a "status . . . unique to German law," which "attributes to the fixed cost freight forwarder the liabilities of a carrier, rendering the fixed cost freight forwarder liable whenever the actual carrier would be liable." Opinion at page 3, note 3. Although the status of fixed cost freight forwarder is unique to German law, the type of liability emanating from that status is not. It is simply a manifestation of the well-established concept of imputed (sometimes referred to as vicarious, attributed, constructive or derivative) liability. The German judgment was in the full amount because Germany has enacted the Visby Amendments to the Hague Rules, which set a considerably higher limitation amount and would have applied to the liability that the actual carrier, Forest Lines, would have incurred in the event that Muller had sued Forest Lines in Germany. Fracht ultimately paid Allianz nearly $ 1,000,000 to satisfy the judgment of the German court.

2. Trial Court Proceedings

LCI filed this suit against Fracht as a preemptive measure seeking among other things a declaration that Fracht's only claim was via subrogation from Muller and thus subject to COGSA's $ 500 package limit, thus limiting liability to only $ 3,000. LCI's

2. 46 U.S.C. § 1304(5).

intent was to avoid the higher Hague-Visby limit, when Fracht filed suit seeking indemnification. Fracht counterclaimed to assert not a subrogation claim but a separate and distinct equitable indemnity claim that under well-established caselaw, and in particular *Federal Marine Terminals, Inc. v. Burnside Shipping Co.*, 394 U.S. 404 (1969), is not subject to any statutory limit.[3] Fracht and LCI filed cross motions for summary judgment. In ruling on those motions, the district court held that Fracht's indemnity claim was not subject to COGSA's package limit.

3. Appellate Proceedings

LCI appealed to the Fifth Circuit Court of Appeals. The appellate court reversed on the ground that Fracht did not have an indemnity claim to recover nearly $ 1,000,000 paid to Allianz to discharge liability incurred solely as the result of Forest Lines' failure to care for the cargo. The Fifth Circuit held that Fracht was relegated to a subrogation claim derived from Muller via Allianz and hence subject to COGSA's package limit. In reaching this result, the Fifth Circuit relied exclusively on its earlier decision, *Cities Service Co. v. Lee-Vac, Ltd.*, 761 F.2d 238 (5th Cir. 1985), while ignoring a plethora of decisions holding that equitable tort indemnity is owed whenever the prospective indemnitee, although without personal fault, has been required to pay a judgment or settlement to the injured third party as the result of vicarious, attributed, constructive or imputed liability derived from the prospective indemnitor's breach of a duty to that injured party. Moreover, the panel, originally and in response to the petition for rehearing, ignored Fracht's suggestion that the Fifth Circuit should adopt as the criterion for tort-based

3. *Federal Marine Terminals* held that an innocent stevedoring company's tort action to recover from a negligent shipowner compensation benefits paid to its injured longshoreman employee was separate and distinct from the cause of action that it acquired from the longshoreman by virtue of subrogation upon paying the statutory benefits. 394 U.S. at 414-15

equitable indemnity the rule articulated in the Restatement of the Law of Restitution § 96 requiring indemnity whenever one has become liable to a third party due to the wrongful conduct of another.

On November 21, 2005 Fracht filed a petition for panel rehearing and one for rehearing *en banc*. On December 6, 2005, both were denied.

REASONS FOR GRANTING THE PETITION

This petition focuses on the doctrine of tort-based equitable indemnity as formulated under federal maritime law and, in particular, the legal principle to be applied in determining whether one party is entitled to indemnification from another. Tort-based equitable indemnity is a doctrine whereby a loss that has been imposed on one party is fully transferred to the shoulders of another. The doctrine, therefore, can have a profound effect on the ultimate outcome of a dispute. Entitlement to tort-based equitable indemnity is a recurrent legal issue that has arisen and will continue to arise in a significantly large percentage of cases. Yet the jurisprudence addressing this doctrine is in a state of turmoil and confusion. A writ of certiorari should be granted for the following reasons:

1. The principles fashioned and applied in the Fifth Circuit's *Fracht* decision and its progenitor *Cities Service* conflict with decisions of other United States Courts of Appeal, which in turn lack consistency among themselves.

2. This manifestly important question of federal law has not been decided by the United States Supreme Court and now should be addressed because it so profoundly affects many disputes and because the cloud of uncertainty surrounding entitlement to this remedy adversely affects the ability of parties to assess their likelihood of success thereby overly complicating the possibility of amicable settlement of disputes.

3. The Fifth Circuit's rule is in conflict with § 96 of the Restatement of the Law of Restitution and notions of fundamental fairness lying at the heart of equitable indemnity. The *Fracht* decision, therefore, departs from mainstream legal principles.

4. As a general rule, federal maritime law should be uniform and consistently applied throughout the United States to promote certainty in international, interstate and domestic commerce by water. Supreme Court review is needed to permit the Court to fashion a definitive rule that will be consistently applied in every Circuit, thereby eliminating the chaos presently existing.

5. The importance and recurrence of tort-based equitable indemnity disputes dictate a need for a rule that promotes certainty and affords relative ease of application

1. The Fracht Decision Conflicts with Decisions of Other United States Courts of Appeal Which in Turn Lack Consistency Among Themselves

The jurisprudence lacks clarity and consistency in identifying criteria or rules to be applied in ascertaining whether one party owes tort-based equitable indemnity to another. No clearly discernible, precisely defined rule of universal and uniform application exists. Instead, federal appellate courts have articulated a variety of bases for allowing or denying equitable indemnity with the result that the doctrine of equitable indemnity is a hodge-podge of sometimes interconnected and sometimes disjointed rules. Consequently, the uniformity and certainty, which federal maritime law is designed to furnish, is lacking.

One line of cases identifies the existence of an "indemnitor-indemnitee relationship" as one of the prerequisites for the creation of a duty to indemnify and, without providing any definition of that abstract phrase, holds that the relationship

occurs when the indemnitor is "guilty of active or primary wrongdoing" and the indemnitee is not "proven negligent." The Third Circuit in *M & O Marine, Inc. v. Marquette Co.*, 730 F.2d 133, 135 (3d Cir. 1984), found an "indemnification relationship" on the basis of the presence of "the theory of primary/secondary negligence in tort." Similarly, the Fourth Circuit in *Boykin v. China Steel Corp.*, 73 F.3d 539, 542 (4th Cir. 1996), relying on *Vaughn v. Farrel Lines, Inc.*, 937 F.2d 953 (4th Cir. 1991), found an indemnification relationship where the indemnitor was "guilty of active or primary wrongdoing," and the indemnitee has "not been proven negligent." *See also White v. Johns-Manville Corp.*, 662 F.2d 243, 249 (4th Cir. 1981), which notes that admiralty recognizes a "theory of indemnity" where the indemnitor is guilty of "active, primary or original fault" and the indemnity of only "passive, secondary or implied fault."

The Fifth Circuit's *Fracht* decision, the review of which this writ seeks, directly conflicts with the Third and Fourth Circuit's formulation of the basis for tort-based indemnity inasmuch as prospective indemnitee Fracht was without fault and prospective indemnitor LCI, as successor to Forest Lines, was the active wrongdoer.[4]

A second line of decisions refers to a "special relationship" as a trigger for tort-based equitable indemnity but provides no definition of what that abstract term means. The Fifth Circuit's *Cities Service* decision fits into that category. Rather than defining "special relationship" to offer guidance in the future, the court simply offered *Federal Marine Terminals* as an example. But that Supreme Court decision makes no reference to the concept of "special relationship." Nor does that decision

4. LCI urged on appeal that its predecessor, Forest Lines, was not a wrongdoer but itself attributed with the negligence of its independent contractor stevedore who negligently secured Muller's cargo. The argument is fundamentally flawed. Forest Lines, as carrier, had a non-delegable duty to have the cargo properly loaded and should have supervised the securing and rectified any shortcomings. *Nichimen Co. v. M. V. Farland*, 462 F.2d 319, 330 (2nd Cir. 1972)

even refer to any type of relationship or use the words "relationship" or "relation." Moreover, nothing in the Supreme Court's opinion intimates that a special relationship is the predicate for the reimbursement obligation recognized in the decision.[5]

The Fifth Circuit's designating the existence of a special relationship as the trigger for tort-based indemnity runs contrary to *White v. Johns-Manville Corp.*, 662 F.2d 243 (4th Cir. 1981). In discussing noncontractual indemnity, *White* stated:

> Such a noncontractual indemnity claim is *not* based on any *preexisting relationship* between indemnitor and indemnitee independent of the injuries for which recovery is sought. It *arises rather from an equitable assessment* of the fault of each in relation to the wrong done.[6]

A third line of decisions regards the "special relationship" trigger as pertaining only to implied contractual indemnity. *E.g., Woods Hole, Martha's Vineyard, Nantucket Steamship Authority* v. *New England Telephone Co.*, 693 F.2d 1 (1st Cir. 1982); *Zapico v. Bucyrus-Erie Co.*, 579 F.2d 714 (2d Cir. 1978). Typically, these cases observe that indemnity, in the broadest sense, arises under three different circumstances: (1) an express provision in a contract between indemnitor and indemnitee; (2) an implied undertaking incident to a contract between indemnitor and indemnitee and (3) tort-based equitable indemnity unrelated to an

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5. To compound the *Fracht* court's faulty reasoning, notwithstanding the Fifth Circuit's categorization of *Federal Marine terminals* as a tort indemnity case, the Supreme Court made abundantly clear that it was not addressing that issue, reserving it for another day. See discussion in subsection 2, pp. 11-12, *infra.*

6. 662 F.2d at 247, citing the Restatement of the Law of Restitution.

existing contract. Illustrating just how confused the law of indemnity has become, the *Woods Hole* decision, after emphasizing the distinction between tort indemnity and implied contractual indemnity,[7] concludes that the "special relationship" requirement applies only to the second of these, i.e., implied contractual indemnity:

> Rather, a *contractual* right to indemnification will only be implied when there are unique *special* factors demonstrating that the parties intended that the would-be indemnitor bear the ultimate responsibility for the plaintiff's safety (citation omitted) or when there is a generally recognized *special relationship.* (emphasis supplied)[8]

The First Circuit, therefore, disagrees and is inconsistent with the Fifth Circuit's *Cities Service* and now *Fracht* decisions that conclude that a "special relationship" triggers tort-based equitable indemnity.

Yet a fourth line of cases, which regards a special relationship as one of the triggers for tort-based indemnity, holds that a "special relationship" is one that "creates liability without fault" and exists when one is "held liable for injuries proximately caused by the negligence" of another. See *Great American Insurance Co. v. United States*, 575 F.2d 1031, 1035 (2d Cir. 1978); and *Prosky v. National Acme Co.*, 404 F. Supp. 852, 855 (E.D. Mich. 1975). This approach essentially employs the legal principle articulated in § 96 of the Restatement of the Law of Restitution as the sole basis

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7. The First Circuit was careful to point out that "indemnification may not be implied merely from the fact that [the prospective indemnitee] was subjected to tort liability for an injury" that the prospective indemnitor caused. 693 F.2d at 2.

8. 693 F.2d at 2. (Emphasis added)

for tort indemnification.[9] The Fifth Circuit's *Fracht* decision, therefore, is inconsistent with the Second Circuit's characterization of what constitutes a special relationship. Moreover, using the *Great American-Prosky* definition of a "special relationship," Fracht and Forest Lines had the requisite special relationship because the carrier/fixed cost freight forwarder relationship created liability without fault on Fracht who was held liable for injuries proximately caused by Forest Lines' failure to care for the cargo. Consequently, Fracht, although losing in the Fifth Circuit, would have prevailed in the Second. The requisite uniformity in general maritime law is lacking.

In a number of jurisdictions the "special relationship" requirement is dovetailed into the line of legal thinking that predicates tort-based equitable indemnity on the fact that the prospective indemnitee has become constructively, secondarily or vicariously liable as the result of the indemnitor's fault. Thus, in *Longport Ocean Plaza Condominium, Inc. v. Robert Cato & Associates, Inc.*, 2002 WL 2013925 (E.D. Pa.), the court held that common law indemnification "must be based on a 'special legal relationship between the parties [that] creates an implied right of indemnification,' since the party asserting the claim must only be liable in a 'constructive, secondary or vicarious' manner." The Fifth Circuit's *Fracht* decision is inconsistent with *Longport* in that even though Fracht was held vicariously, constructively and attributively liable to Allianz

9. The Restatement, however, does not use the term "special relationship." Indeed, use of that term unduly complicates the analysis. Under the Restatement's formulation, the relationship is not the focus nor the pivotal point upon which the existence of a right of tort-based equitable indemnity turns. Instead, imposition of liability on an innocent party as the result of another's misconduct is the trigger.

under German law, the Fifth Circuit found no special relationship.[10]

Still another – a fifth – line of cases concludes that tort-based indemnity is triggered when the prospective indemnitee, although personally without fault, becomes vicariously liable to the plaintiff for the prospective indemnitor's fault. *E.g., Wallenius Bremen G.m.b.H. v. U.S.*, 409 F.2d 994, 998 (4th Cir. 1969), where the court identified tort indemnity as flowing from the presence of primary fault on the part of the prospective indemnitor and "passive or constructive, or vicarious or insulated" fault on that of the indemnitee.[11] See also *Garbincius v. Boston Edison* Co., 621 F.2d 1171, 1175-76 (1st Cir. 1980), observing that "indemnity is allowed where there is vicarious liability" and is permitted when a non-negligent party is "exposed to derivative or vicarious liability for the wrongful act of another."[12] And in *Jordan v. Madison Leasing Co.*, 596 F. Supp. 707, 709 (S.D.N.Y. 1984), the court, in clarifying the proper significance of the terms "primary" and "secondary" liability, concluded that "implied by law" indemnity, i.e. equitable indemnity, arises "where the party seeking indemnity was

10. We recognize the *Longport* is not a federal appellate decision falling within the parameters of Supreme Court Rule 10. The opinion, nevertheless, illustrates the disarray and confusion into which tort indemnity law has fallen.

11. *Wallenius* noted that since the purpose of indemnification is to relieve the relatively innocent indemnitee and shift the burden to the more blameworthy party, the fact that "the latter has a personal defense if sued by the injured person would seem to be irrelevant." 409 F.2d at 998. This is in effect the same result reached in *Federal Marine Terminals*.

12. *Garbincius* was decided under Massachusetts law, not general maritime law, but on occasion a court, although applying general maritime law, will rely on other jurisdictions' law for reference.

not personally at fault . . . but was held liable to the plaintiff only vicariously."

In that same vein, other decisions, relying on the Restatement of the Law of Restitution, have set forth yet a sixth view by characterizing the trigger as the imposition of "constructive, vicarious or derivative" liability imposed on an innocent party (prospective indemnitee) by virtue of another's actual fault. *See White v. Johns-Manville Corp., supra* at 249, observing that "[w]here the indemnitee's liability is merely constructive, vicarious or derivative, the . . . entire loss may be shifted to the indemnitor whose actual fault caused the injury." These cases sometimes categorize the prospective indemnitee's involvement as "constructive or technical fault" or characterize the distinction as "passive and active fault." *E.g., Danny's Construction Co. v. Havens Steel Co.*, 437 F. Supp. 91, 93 (D. Neb. 1977), cited in the *White* decision.

Significantly, *White* states that the distinction between primary and secondary liability is not based on "mere indifference in degrees of fault" but rather on "a difference in the *character* or *kind*" of the wrong and in the "nature of the legal obligation" owed to the injured person. The *White* court then singled out "constructive, vicarious or derivative liability as an example of this difference in character of duty owed and nature of obligation. The *Fracht* decision ignored the fact that Fracht's liablity was constructive, vicarious and derivative and hence of a different character and nature than that of Forest Lines. The *Fracht* decision, therefore, is in conflict with the Fourth Circuit. 662 F.2d at 249. Fracht, therefore, would prevail in the Fourth Circuit whereas it lost in the Fifth.

Still another approach (the seventh one) has limited the basis for tort-based indemnity to a difference in the kind of

negligence of indemnitor and indemnitee – the active/passive distinction. The Second Circuit's *Zapico* decision, after relegating the "special relation" test to implied contractual indemnity, identified the trigger for tort-based indemnity as being based "merely upon a difference between the kinds of negligence of the two tortfeasors; as for instance, if that of the indemnitee is only 'passive,' while that of the indemnitor is 'active.'" 579 F.2d at 718. To the same effect is the Third Circuit's opinion in *SPM Corp. v. M/V Ming Moon*, 22 F.3d 523, 526 (3rd Cir.1994), noting that "under tort principles, as opposed to contract, a passively negligent party in admiralty can recover indemnity damages from a primary negligent party."[13]

Curiously enough, a Fifth Circuit decision, *Savoie v. Loffland Brothers Co.*, 627 F.2d 722 (5th Cir. 1980), has embraced and applied the active-passive theory for tort indemnity, albeit in different guise than in the *Zapico* and *Ming Moon* decisions. In *Savoie* the court concluded that indemnification was appropriate when a Jones Act seaman's employer became liable to pay its employee maintenance and cure as the result of injuries inflicted by a third party's negligence working in concert with the seaman's contributory negligence. Although using the "active/passive" rubric, this Fifth Circuit panel in effect adopted the standard of § 96 of the Restatement:

> Indemnification of the innocent employer is based on the commonsense principle that a party whose neglect has caused or contributed to the need for maintenance and cure payments should reimburse the cost of those payments, which

13. The Third Circuit, without referring to the concept of an "indemnity relationship" *per se*, did speak in terms of indemnity arising "in a broad range of relationships." 22 F.3d at 526.

> would otherwise be borne by a non-negligent or passively negligent employer.[14]

The Fifth Circuit, therefore, is internally inconsistent. Applying the *Savoie* test, as formulated in that opinion, to the instant case, Fracht would be entitled to indemnification. Fracht fits the description of a *Savoie* indemnitee like a glove. Even more curiously, the Fifth Circuit's *Fracht* and *Cities Service* decisions cite *Savoie* as illustrative of the third indemnity trigger identified in those decisions – a difference in the character of the duty owed. Yet nowhere in *Savoie* is such a concept expressly mentioned or even intimated.

A final line of thinking, perhaps more amorphous than these other approaches but certainly more connected to the spirit of tort-based equitable indemnity, focuses on fundamental fairness. This line of cases concludes that a tort-based duty to indemnify, because it is equitable in nature, can arise "if it is simply fairer to shift the burden." *Hydro-Air Equipment, Inc. v. Hyatt Corp.*, 852 F.2d 403, 406 (9th Cir. 1988). That result is consistent with the equity-based roots of federal maritime law. *Consolidated Grain & Barge Co. v. American Barge and Towing Co.*, 766 F. Supp. 754 (E. D. Mo. 1991). The Ninth Circuit's *Hydro-Air Equipment* decision is in conflict with the Fifth Circuit's *Fracht* and *Cities Service* opinions because in the latter the element of fundamental fairness never enters the equation. And so in the Fifth Circuit innocent Fracht must bear the brunt of the loss imposed by careless Forest Lines failure to care for the cargo.

One of the fundamental purposes of law is to guide the citizenry in their actions. Yet tort-based equitable indemnity law is rudderless. The varied approaches taken in the different appellate circuits and even within the same circuit

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14. 627 F.2d at 723.

unequivocally reveal that the legal community is in dire need of the Supreme Court's guidance. Fracht's writ should be granted so that this Court can restore stability to the law of tort-based equitable indemnity.

2. *The Fifth Circuit's Fracht Decision Decided an Important Question of Federal Maritime Law That Has Not Been Directly Addressed by the Supreme Court*

The Supreme Court has not directly addressed the question of when tort-based indemnity is owed. This Court, however, has resolved issues relating to availability of contribution under federal maritime law. The Court's decision in *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282 (1952), determined that general maritime law does not recognize a right to contribution between joint tortfeasors except in collision cases. The Court later revisited that issue and overturned *Halcyon* to conclude that a right of contribution does exist in non-collision admiralty cases. *Cooper Stevedoring Co. v. Fritz-Kopke, Inc.*, 417 U.S. 106 (1974). And in *McDermott, Inc. v. Amclyde and River Don Castings, Ltd.*, 511 U.S. 202 (1994), the Supreme Court addressed the related question of how the liability of nonsettling tortfeasors should be ascertained.

The Supreme Court also has considered the issue of whether a stevedore, which became liable to pay compensation benefits to its employee-longshoreman solely as the result of shipowner negligence, is limited to its subrogation remedy against the negligent shipowner or, instead, has a tort-based right of recovery based on the shipowner's duty of due care, as recognized in *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625 (1959), "to all who are onboard for purposes not inimical to his legitimate interests the duty of exercising reasonable care . . . ." *Id.* at 632. The Court concluded that the stevedoring

company not only has a subrogation action, which was derived from the deceased longshoreman's representative albeit limited in amount by the Illinois Wrongful Death Statute, but also an independent tort-based cause of action for reimbursement unrestricted by that statute.[15]

The *Federal Marine Terminals* Court pointedly noted that its recognition of a stevedore's tort action based on *Kermarec* did not preclude other bases for recovery:

> In holding that the stevedoring contractor has a direct action in tort, we do not preclude the possibility of a direct action under some other theory.[16]

One of these other bases for a direct action against the shipowner was tort-based equitable indemnity. The *Federal Marine Terminal* Court took note of the stevedore's contention that, putting aside the contractual relationship between the parties, it also had a right of indemnity "conferred by law in order to place the liability where it justly belongs."[17] The Court, carefully pointing out that "[w]e

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15. The shipowner urged that the Longshoremen's and Harbor Worker's Act provided the exclusive remedy and thus preempted assertion of this independent tort claim. The Court rejected the argument. 394 U.S. at 413-4. This case was decided before *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970), overruled *The Harrisburg*, 119 U.S. 199 (1886), and hence *The Tungus*, 358 U.S. 588 (1959), to find that federal maritime law recognized a cause of action for wrongful death so that resort to state statutes no longer was necessary. *Moragne*, however, has no impact on the *Federal Marine Terminals* holding that the independent tort action based on *Kermarec* is not subject to the defenses that could have been raised against the separate subrogation action.

16. 394 U.S. at 418.

17. *Id.* at 420.

express no opinion on the validity of this indemnity theory or its application to this case," nevertheless referred to a line of decisions recognizing that very cause of action:

> [A]dmiralty courts have recognized a right of indemnification . . . in a person who has responded in damages for a loss caused by the wrongs of another. This right has been recognized in two general classes of cases: those in which the person seeking indemnification was without fault; and those in which such person was passively negligent, but the primary cause of the loss was the active negligence of another.[18]

The *Federal Marine Terminals* Court then concluded, "We express no opinion on the validity of this indemnity theory," leaving its resolution for another day. 394 U.S. at 421.

We respectfully submit that, taking into account the existing disarray in the law of tort-based equitable indemnity as evidenced by the hodge-podge of theories mentioned in the previous section, the instant case is the appropriate one to resolve the issue of when a right of equitable indemnity arises. For that reason alone, we respectfully submit, a writ of certiorari should be granted.

3. The Fifth Circuit's Tort-Based Equitable Indemnity Rule Departs from Mainstream Legal Principles

In denying Fracht equitable indemnity, the Fifth Circuit departed from the well-conceived, mainstream principle,[19]

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18. *Id.* at 420. The first of these two general classes embraces the approach prescribed in §96 of the Restatement of Restitution.

19. The previous section of this Petition points out that the approaches taken by some of the United States appellate courts to

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articulated in § 96 of the Restatement of the Law of Restitution, that the sole trigger or criterion for a right of tort-based equitable indemnity is that the prospective indemnitee, itself without fault, shall have become liable to the injured party for the wrongful conduct of another. That section of the Restatement provides:

> A person who, without personal fault, has become subject to tort liability for the unauthorized and wrongful conduct of another is entitled to indemnity from the other for expenditures properly made in discharge of that liability.

Comment (a) to § 96 observes that this principle applies to "situations in which, by statute or otherwise, a person without fault is responsible for the conduct of another." This is the very approach noted in *Federal Marine Terminals* as falling within one of the two general classes of cases in which federal admiralty courts have recognized a right of indemnity.[20]

Liability of this nature has been labeled in a variety of ways – imputed, vicarious, constructive and attributed – all of which signify that a legal principle, whether derived from decisional or statutory law, visited liability on that innocent party as the result of another's negligence. A significant number of decisions have embraced the Restatement rule, either expressly or effectively, by holding that a right to tort-based indemnity arises when an innocent party is attributed vicariously, constructively or imputedly with the negligence of another.[21] This approach to

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tort-based equitable indemnity are inconsistent not only with the Fifth Circuit's *Fracht* decision and its progenitor, *Cities Service*, but in some instances with one another. This, however, is not to say that a mainstream principle does not exist – only that not all of the courts expressly embrace it.

20. *See* text at n.17.

21. *See* cases cited subsection 1, *supra* at p. 9.

tort-based indemnity is fully consonant with, if not compelled by, the equitable nature of tort indemnity and adheres to the pronouncement in *Hydro-Air Equipment* that "implied equitable indemnity may be entirely proper if it is simply fairer to shift the burden of loss." 852 F.2d at 406.

Essentially the same trigger identified in § 96 – imputed or attributed liability without fault imposed by that of another – is identified in PROSSER & KEATON ON TORTS (5th ed. 1984) § 51 at pages 341-2:

> Thus it is generally agreed that there may be indemnity in favor of one who is held responsible solely by imputation of law because of a relation to the actual wrongdoer, as where . . . an innocent . . . carrier is held liable for the acts of another. . . .

The Fifth Circuit, in denying Fracht indemnity, departed from these redoubtable equitable principles to produce the harsh result of leaving Fracht to bear the brunt of the cargo loss caused solely by Forest Lines' failure to care for Muller's cargo. Instead of following the eminently fair rule of § 96, the *Fracht* panel based its decision on an earlier Fifth Circuit case, *Cities Service Co.*, which purported to sum up (i.e., restate) the general maritime law of tort indemnity as follows:

> Indemnity is a shifting of responsibility from the shoulders of one person to another, and may arise either in contract or in tort. In tort, indemnity may arise because of the relation of the indemnitor to the indemnitee and the consequent duty owed, because of a significant difference in the degree of their conduct, or because of a difference in character of the duties owed by the two to the injured party. 761 F.2d at 240.

Cities Service and its progeny, *Fracht*, therefore, identified three triggers for tort-based equitable indemnity:

> 1. The existence of a "special relationship" between indemnitor and indemnitee;[22]
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> 2. Disparity in the degree of fault (conduct);[23] and
>
> 3. Difference in the character of the duty owed to the injured party.

The Fifth Circuit's recapitulation of the law of restitution in the form of tort-based equitable indemnity clearly is quite different from the conclusions reached by the American Law Institute when drafting § 96 of the Law of Restitution, which predicates tort-based equitable indemnity solely on the fact that an innocent indemnitee has become liable to a third party for injuries caused by the indemnitor's shortcoming – an approach that embraces the concept of fundamental fairness.

Cities Service cited but one source or authority for its three triggers – W. PROSSER, THE LAW OF TORTS § 51 (4th ed. 1971).[24] But that treatise does not support the Fifth Circuit's

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22. The Fifth Circuit characterized the requisite relationship as "special" in both opinions. In *Cities Service* the court stated that "the stevedoring company and the shipowner had a special relationship." 761 F.2d at 420. In *Fracht* the court said that "there is no special relationship . . . between Forest Lines, the shipowner and carrier, and Fracht, the freight forwarder." Opinion at p. 6.

23. The second trigger – difference in degree of fault – was supplanted by *United States v. Reliable Transfer Co.*, 421 U. S. 397 (1970), which overturned the divided damages rule for collision cases along with the major-minor fault corollary, by holding that federal maritime law embraces the doctrine of comparative fault.

24. *See* 761 F.2d at 240.

restatement of tort indemnity law. To the contrary, that treatise at § 51, pages 310-11 identified imputed liability as the trigger for tort indemnity:

> Thus it is generally agreed that there may be indemnity in favor of one who is held responsible solely by imputation of law because of his relation to the actual wrongdoer, as where an employer is vicariously liable for the tort of a servant or an independent contractor; or an innocent partner or carrier is held liable for the acts of another. . . . (footnotes omitted)[25]

Essentially, this is the same trigger prescribed in § 96 of the Restatement, and the example of an innocent carrier so closely parallels the instant case as to be conceptually indistinguishable. An ocean carrier has a non-delegable duty to care for the cargo and, although perhaps itself free from fault under the particular facts of a given case and hence innocent, is imputedly liable to the cargo owner if the stevedore damages the cargo. *Nichimen Co. v. M/V Farland, supra.* Fracht, by virtue of being liable under German law whenever the actual carrier is liable for cargo damage, is conceptually identical from an indemnity standpoint to the "innocent carrier" in the example from Prosser. Moreover, the three triggers *Cities Service* extracted from Prosser are mentioned later in the treatise at § 51, page 313, accompanied by the observation that "*probably none of these is the complete answer.*" The same conclusion is expressed in the following edition of the treatise – PROSSER & KEATON ON TORTS (5th ed. 1984) § 51 at page 344. Consequently, the three triggers identified in *Cities Service* and followed in *Fracht* are not definitive according to the very source from which the Fifth Circuit extracted them.

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25. W. PROSSER, THE LAW OF TORTS § 51 p.311 (4th ed. 1971).

Not only is the treatise upon which *Cities Service,* and hence *Fracht*, are based unsupportive of the three-trigger rule but also the decisions that *Cities Service* cites as illustrations of the first and third triggers – "special relationship" and "difference in character of duties owed"– are unsupportive. As previously mentioned, the case chosen to illustrate a special relationship, *Federal Marine Terminals*, is not even a tort indemnity case. Indeed, if anything, *Federal Marine Terminals* fully supports Fracht's position because the duty of care recognized in that Supreme Court decision basically consists of the obligation to refrain from acts or omissions that would visit imputed liability on the innocent stevedoring company; and, as a parallel principle, the duty of care Fracht advocates is that the shipowner/carrier refrain from acts or omissions that would visit imputed liability on innocent Fracht.[26] Moreover, of utmost significance, *Federal Marine Terminals* does not rely upon or even mention the existence of a special relationship as the predicate for the tort duty that entitled the stevedoring company to reimbursement. Consequently, the illustrative case chosen by the Fifth Circuit ironically illustrates that its "special relationship" trigger is ill-conceived.

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26. In briefing the indemnity issue to the Fifth Circuit, Fracht maintained that *Federal Marine Terminals* was controlling authority that established the existence of a duty for Forest Lines/LCI to indemnify Fracht, using the above comparison to an innocent carrier as support. In seeking rehearing, Fracht urged that the Fifth Circuit's decision was inconsistent with *Federal Marine Terminals* for this very same reason. In writing this petition we realized that *Federal Marine Terminals* was not a tort indemnity case, even though *Cities Service* had so characterized it. For that reason Fracht has decided not to urge that the *Fracht* decision conflicts with *Federal Marine Terminals* within the meaning of Supreme Court Rule 10(c). Fracht, nevertheless, believes that the *ratio decidendi* in that decision encompasses the situation presented in the Fracht/LCI dispute. If a writ is granted, we will ask the Court for permission to so argue and for that reason have listed it as a question for review but have not briefed it as a reason for granting a writ.

The second illustrative case, *Savoie,* chosen by the Fifth Circuit, this time to illustrate a difference in character of duties owed, does not rely upon or even mention the existence of a difference in character of duties. Instead, that decision, ironically enough, implements the approach articulated by § 96 of the Restatement (without expressly mentioning it) stating:

> It is well-established in this circuit that an innocent employer is entitled to indemnification from a negligent third party for payments made to an employee injured as a result of the third party's negligence.[27]

That being the case, the question squarely presented is whether the *Cities Service* rule with its preclusive three ways to trigger equitable tort indemnity is the appropriate test to be applied throughout this country as uniform federal maritime law. It most assuredly is not. And the reasons are various and broad in spectrum:

1. Tort-based indemnity is equitable in nature, and denying Fracht full indemnity for liability visited upon it by a carrier derelict in its duties is not fair.

2. Not one decision in any other circuit of the United States has adopted the three-trigger rule espoused by *Cities Service* and *Fracht* so that rule has not gained acceptance.

3. Not one other decision in the United States has denied equitable indemnity to an innocent party, like Fracht, who has become imputedly, vicariously, attributedly or constructively liable to the injured party due to the failure of the indemnitor to perform its duties to that party; and the *Fracht* decision cites no such authority.

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27. 627 F.2d at 723.

4. The Fifth Circuit's test and its *Fracht* result run directly contrary to the mainstream rule identified in § 96 of the Restatement of the Law of Restitution, the avowed purpose of which is "to present an orderly statement of the general common law of the United States" in an effort to promote "certainty and clarity."[28]

5. Finally, the Fifth Circuit's remaining viable triggers – special relationship and difference in character of duty owed – are too nebulous to provide the guidance courts and litigants need to make informed decisions concerning their legal rights.[29]

Supreme Court review is needed to eliminate the present confusion in the law of indemnity and to reject the Fifth Circuit's *Fracht* and *Cities Service* rule. Review is needed so that the Supreme Court can adopt the principle articulated in § 96 of the Restatement. Implementing the § 96 standard is particularly appropriate in an admiralty context because the federal appellate courts, in fashioning federal maritime law, rely on the Restatements as a source.[30] *Vickers v. Chiles Drilling Co.*, 822 F.2d 535, 537-8 (5th Cir. 1987); *Marastro Compania Naviera, S.A. v. Canadian Maritime Carriers,*

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28. RESTATEMENT OF THE LAW OF RESTITUTION, Introduction at p. ix.

29. This particular reason for rejecting the *Cities Service* approach is discussed in the next reason for granting a writ of certiorari. It has been singled out because of its association with the need for a uniform rule that guides litigants and courts with clarity and ease of application.

30. Federal maritime law is "an amalgam of traditional common law rules, modifications of those rules, and newly created rules drawn from state and federal sources." *East River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U. S. 858 (1986). The restatement is intended to state the federal common law. *See* text at n.24, *supra.*

Ltd., 959 F.2d 49, 53 (5th Cir. 1992); *Pan-Alaska Fisheries, Inc. v. Marine Construction & Design Co.*, 565 F.2d 1129, 1134 (9th Cir. 1977). Fracht respectfully submits that this petition be granted for this additional reason.

4. *Need for a Rule that Promotes Certainty and Affords Relative Ease of Application*

This appeal involves more far-reaching consequences than the narrow confines of Fracht's dispute with LCI over indemnity to a fixed cost freight forwarder. Instead, it encompasses the full reach of the doctrine of equitable indemnity and focuses on the issue of what triggers a tort duty to indemnify – an issue that will arise repeatedly and frequently in this Circuit in many different contexts including casualties related to ocean carriage involving international commerce, incidents on the inland waterways involving interstate and domestic commerce, oil patch disputes, products liability matters and everything in between. Consequently, this Circuit should adopt a test for triggering the equitable indemnity obligation that is simple to state and easy to apply – not to mention one that conforms to mainstream legal principles. The triggers enunciated in *Cities Service* and applied in the *Fracht* panel opinion hardly qualify.

Notions of "special relationship" and "character of duty owed" are pure abstractions – buzzwords devoid of intrinsic meaning. These vacuous words reflect an unsuccessful judicial struggle to communicate an elusive concept. Unsurprisingly, resort to these empty words affords no tangible basis for efficiently determining whether an equitable indemnity obligation has arisen. These sterile words are too detached from human events to afford judge or litigant any meaningful guidance, leaving them guessing whether the facts fit into a "special relationship" or "disparate character

of duty owed." Indeed, that very guesswork foments litigation because the parties must labor with uncertainty in evaluating a case for purposes of settlement.

Needed is a more readily ascertainable, less ineluctable standard that removes uncertainty from the equation, thereby eliminating subjective judgments and substituting a determinable rule of law.[31] Needed is a concrete approach to replace the sterile words and unfathomable concepts fashioned in *Cities Services* and followed in *Fracht* – an approach that will permit litigants and courts ease in ascertaining whether indemnity is due. And such an approach will foster settlement because litigants will have a far better conception of the likely outcome of an indemnity dispute.

A writ should be granted so that this Court can decide whether the straightforward rule of § 96 of the Restatement should be adopted so that the sole criterion of the existence of an equitable indemnity obligation is that the indemnitee was innocent but became liable for the wrongful and unauthorized conduct of another – whether that imputed liability is vicarious, constructive, derivative, attributed or otherwise.

If the standard prescribed in § 96 of the Restatement of the Law of Restitution were adopted by the Supreme Court, trial courts henceforth, when determining whether equitable indemnity is owed, would face a relatively easy task no matter how complex or intricate the underlying facts may be. The trial court would have merely to identify the basis upon

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31. For example, in *State of Louisiana v. M/V Testbank*, 752 F. 2d 1019 (5th Cir. 1985), the Fifth Circuit *en banc* favored a bright line test because otherwise "there will be no rationale for differing results save the 'judgment' of the trier of fact" and "judgments would be much less the product of a determinable rule of law." 752 F.2d at 1028-9.

which the prospective indemnitee became liable to the third party. If that liability did not result from direct misconduct of the prospective indemnitee but instead from a species of imputed liability emanating from the prospective indemnitee's wrongful act, indemnity would be owed. If liability is imposed on any other basis, indemnity would not be owed. This simple test, which applies the most basic of tort doctrines (direct versus imputed liability), eliminates the need to figure out whether the relationship is special or whether a difference in the character of duties owed exists – each a highly subjective enterprise. Under this simple test Fracht is entitled to tort-based equitable indemnity unlimited by COGSA'a package limit just as the stevedoring company's indemnity claim was unlimited in *Federal Marine Terminals.*[32]

5. *The Uniformity Principle of Federal Maritime Law Warrants Review to Formulate a Rule for Ascertaining the Availability of Equitable Tort Indemnity*

Fracht's claim for tort-based equitable indemnity involves the carriage of goods by sea and the ramifications of an ocean carrier's failing to properly care for the cargo thereby imposing vicarious, attributed and imputed liability on a fixed cost freight forwarder. That claim involves traditional maritime activities with damage occurring on the high seas and falls within the admiralty and maritime jurisdiction of the federal courts. 28 U.S.C. § 1333. *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249 (1972); *Green v. Vermillion Corp.*, 144 F.3d 332, 336 (5th Cir. 1998).

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32. LCI's constant refrain in its trial court and appellate briefs was that Fracht is asserting a subrogation action which is subject to the same defenses as the suit that could have been brought by the subrogor – Allianz who in turn was subrogated to Muller's rights. That argument ignores the fact that the same argument was rejected in *Federal Marine Terminals.*

Because Fracht's claim falls within the admiralty and maritime jurisdiction, general maritime law applies. *Kermarec v. Compagnie Generale Transantlantique, supra* at 628; *Vaughn v. Farrel Lines*, 937 F. 2d 953, 956 (4th Cir. 1991); *Jansson v. Swedish Am. Line,* 185 F.2d 212, 216 (1st Cir. 1950) (where the cause of action asserted is founded on maritime tort, cognizable in admiralty, the substantive law to be applied is general maritime law of which the ultimate expositor is the Supreme Court of United States). Indeed, the Fifth Circuit resolved this dispute under its formulation of the general maritime law of tort indemnity.

A fundamental precept of admiralty and maritime jurisdiction is that general maritime law must be uniform and consistent across the entire United States. *See Moragne v. States Marine Lines, Inc., supra* at 1778, wherein the Court, referring to *The Lottawanna*, 21 Wall. 558, 575, 22 L. Ed. 654 (1875), described this uniformity principle as giving "effect to the constitutionally based principle that federal admiralty law should be 'a system of law coextensive with, and operating uniformly in, the whole country.'" As demonstrated by consideration of the varied approaches the federal appellate courts have taken to the principle of tort indemnity, uniformity presently is lacking. Accordingly, a writ of certiorari should be granted to review the Fifth Circuit's *Fracht* decision so that a uniform rule can be established. And, as previously mentioned, Fracht respectfully submits that § 96 of the Restatement furnishes the appropriate standard.

CONCLUSION

Tort-based equitable indemnity is a frequently occurring issue in admiralty and maritime cases. The law of tort-based equitable indemnity is inconsistent, and discerning a consistent approach and a uniform conceptual basis for the

grant or denial of such indemnity presently is impossible. The Fifth Circuit's *Fracht* decision with its three-trigger test is an anomaly that is not followed by any other federal appellate court. The concepts of a "special relationship" and a "difference in character of duty owed" articulated in that decision are undefined and, in any event, vague, elusive and even ineluctable. The other appellate circuits have fashioned rules that clash with one another either totally or to some extent. Certainly, the opinions of the appellate courts furnish no easily applied principle or criteria to use in ascertaining whether this type of indemnity is owed. Succinctly stated, the law of equitable indemnity is in disarray, and the legal community needs this Court's guidance.

An eminently sensible and fair rule, one easily stated and equally easily applied, is available. It is found in § 96 of the Restatement of the Law of Restitution, all of the restatements being long regarded as an important source of federal maritime law. This rule would grant tort-based indemnity whenever the indemnitee is without fault and becomes liable to an injured party as the result of the negligence of the indemnitor. This rule fully embraces notions of fundamental fairness and equity which are the cornerstone of admiralty and maritime law. We respectfully submit that a writ of certiorari should be granted so that the confusion and inconsistency prevalent in indemnity law can be eliminated and the fundamentally fair rule of § 96 of the Restatement be adopted as the federal maritime law of the United States.

Fracht was an innocent party without personal fault. Fracht became liable for the unauthorized and wrongful conduct of Forest Lines and paid nearly $1,000,000 to discharge taht liability. The facts of this case fit into the sole basis for tort-based equitable indemnity prescribed in § 96 of the Restatement of Restitution. Accordingly, if that

principle is adapted by this Court, the decision of the Fifth Circuit should be reversed on the ground that under federal maritime law Fracht does have a tort-based right of equitable indemnity against LCI as successor to Forest Lines.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT FILED NOVEMBER 4, 2005

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 04-30937

LCI SHIPHOLDINGS, INC., for itself and as the successor-in-interest to Forest Lines, Inc.,

Plaintiff-Counter Defendant-Appellant,

v.

MULLER WEINGARTEN AG, et al.,

Defendants,

FRACHT FWO AG,

Defendant-Counter Claimant-Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana
USDC No. 2:03-CV-1396-C.

Before REAVLEY, HIGGINBOTHAM and GARZA, Circuit Judges.

Appendix A

PER CURIAM:*

We must consider whether a freight forwarder, who is found liable to an insurance company in a German court, and satisfies that judgment, has a tort indemnity claim under general maritime law against a carrier. The district court did not directly address this issue, but assumed that the freight forwarder had a tort indemnity claim. Holding that under the facts of this case, the freight forwarder does not have a tort indemnity claim under general maritime law, we reverse and remand with instructions.

I.

Muller Weingarten AG ("Muller") contracted to sell press lines to General Motors ("GM"). Fracht FWO AG ("Fracht"), a German freight forwarder,[1] contracted with Muller to arrange for the shipment and transportation of Muller's press lines to GM. Fracht booked passage for the shipment to the United States with Forest Lines, Inc. ("Forest Lines"), predecessor-in-interest to LCI Shipholdings, Inc. ("LCI"),[2]

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* Pursuant to 5TH CIR. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

1. A freight forwarder "arranges for, coordinates, and facilitates cargo transport, but does not itself transport cargo." *Norfolk S. Ry. Co. v. Kirby*, 543 U.S. 14, 125 S.Ct. 385, 390, 160 L.Ed.2d 283 (2004).

2. The carrier is interchangeably referred to as "Forest Lines" or "LCI."

through Forest Lines' booking agent, Herfurth & Co. Shipping GmBH ("Herfurth"). Herfurth issued a datafreight receipt naming Muller as shipper and Forest Lines as carrier for the presses, which were damaged in transit.

Allianz Versicherungs AG ("Allianz"), an insurance company, provided coverage to Muller for the cargo damage and paid the claim. As subrogee of Muller, Allianz sued Fracht in German court, which found, after a trial, that Fracht was a fixed cost freight forwarder under its contract with Muller, and thus, liable to Allianz to the same extent as the actual carrier.[3] Thereafter, Fracht settled with Allianz.

Fracht brought the instant suit seeking indemnity against LCI for the amount it paid Allianz to settle the claim. Fracht claimed that after it satisfied the German court judgment by paying Allianz, it became vested with two separate and distinct causes of action: (1) a subrogation claim, and (2) a tort indemnity claim. Fracht admits that its subrogation claim is subject to the package limitation of the Carriage of Goods by Sea Act (COGSA), 46 U.S.C. § 1304(5) as set forth in the datafreight receipt between LCI and Muller. This is so because the subrogee (Fracht) does not obtain redress in its own right but only as successor to the rights of the subrogor (Allianz and Muller). *In re Admiral Towing & Barge Co.*,

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3. The status of "fixed cost freight forwarder" is unique to German law and is not recognized in the United States. Under German law, the fixed cost freight forwarder performs services at a fixed rate, rather than for a percentage commission of the freight charged by the actual carrier. German law attributes to the fixed cost freight forwarder the liabilities of a carrier, rendering the fixed cost freight forwarder liable whenever the actual carrier would be liable.

767 F.2d 243, 250 (5th Cir.1985). Therefore, Fracht can obtain no greater rights than Allianz and Muller had, and LCI would be able to invoke the COGSA package limitation against Allianz and Muller. *Id.*

However, Fracht argues that its tort indemnity claim is not subject to the COGSA package limitation. LCI argues that Fracht's causes of action are identical and derive from the same source—legal subrogation of Allianz and Muller. Further, LCI contends that Fracht does not have a separate and independent tort indemnity claim under general maritime law. In granting Fracht's motion for summary judgment and denying LCI's motion for summary judgment, the district court held that LCI could not limit its liability under the COGSA package limitation and its datafreight receipt against Fracht's tort indemnity claim. However, before the district court could resolve this issue, it was required to first determine whether Fracht had a tort indemnity claim under general maritime law. It did not do so, but assumed that Fracht had a tort indemnity claim under general maritime law. We begin with that issue.

II.

The availability of common law indemnity under general maritime law is limited. This Court has outlined three ways in which a valid tort indemnity claim may arise: (1) when there is an indemnitor and indemnitee relation and consequent duty owed; (2) when there is a significant difference in the indemnitor and indemnitee's degree of conduct; and (3) when there is a difference in the character of the duties owed by the two to the injured party. *Cities Serv. Co. v. Lee-Vac, Ltd.*,

761 F.2d 238, 240 (5th Cir.1985) (citing W. PROSSER, THE LAW OF TORTS § 51 (4th ed.1971)). In addition, in limited circumstances, this Court has recognized a tort indemnity claim based on the warranty of workmanlike performance ("WWLP") implied in maritime contracts under *Ryan Stevedoring Co., Inc. v. Pan-Atlantic S.S. Corp.*, 350 U.S. 124, 76 S.Ct. 232, 100 L.Ed. 133 (1956). Fracht claims that the first and third types of tort indemnity, along with an implied WWLP are present in this case. We will address each in turn.

A.

The first type of tort indemnity recognized in *Cities Service Co.* occurs when there is an indemnitor and indemnitee relation and consequent duty owed. The Supreme Court illustrated this example in *Federal Marine Terminals, Inc. v. Burnside Shipping Co., Ltd.*, 394 U.S. 404, 89 S.Ct. 1144, 22 L.Ed.2d 371 (1969). In *Burnside*, a stevedoring company brought an indemnity action against a shipowner to recover compensation that the stevedore was required to pay to the widow of a longshoreman injured by shipowner's negligence. The Court held that federal maritime law imposes on the shipowner a duty of care to longshoremen, and thus, the shipowner's breach of its duty gave rise to a cause of action by the stevedore to recover payments made by the stevedore because of the shipowner's negligence. *Id.* at 416-17, 89 S.Ct. 1144. In essence, the stevedoring company and the shipowner had a special relationship and, therefore, the shipowner owed the stevedoring company a duty of care not to injure any of its longshoremen.

Appendix A

The instant case does not involve a shipowner and stevedore, rather a shipowner and a freight forwarder, and further, there is no special relationship (or consequential duty owed therefrom) between Forest Lines, the shipowner and carrier, and Fracht, the freight forwarder, that can be compared to the shipowner's relationship with and duty owed to a stevedoring company. To the contrary, the damages claimed in this case arise from damage to Muller's cargo, and any duty breached by Forest Lines that could have caused the damage was a duty to Muller, the shipper, not to Fracht, the freight forwarder. Accordingly, *Burnside* does not provide a basis for finding tort indemnity in the present case.

B.

The third type of tort indemnity recognized in *Cities Service Co.* occurs when there is a difference in the character of duty owed to an injured third party. This is illustrated by *Savoie v. Lafourche Boat Rentals, Inc.*, 627 F.2d 722, 723-24 (5th Cir.1980), wherein this Court held that where a seaman's employer is required to make maintenance and cure payment to an innocent seaman, because the employer is bound to do so by the special duty imposed upon it by admiralty law when an innocent seaman is injured by a third party,[4] the otherwise innocent employer is entitled to indemnification from the negligent third party.

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4. "A seaman's right to maintenance and cure is implied in the employment contract between seaman and shipowner. It 'in no sense is predicated on the fault or negligence of the shipowner.' Thus, an owner of a vessel is almost automatically liable [for maintenance and cure]." *Brister v. A.W.I., Inc.*, 946 F.2d 350, 360 (5th Cir.1991) (quoting *Aguilar v. Standard Oil Co. of New Jersey*, 318 U.S. 724, 730, 63 S.Ct. 930, 934, 87 L.Ed. 1107 (1943)) (internal citations omitted).

We find that Fracht's attempt to fit itself under the this type of tort indemnity is misguided. Tort indemnity based on the indemnitee's special duty owed to the injured party is not proper in this case. The payment for which Fracht seeks indemnification does not arise out of some special duty it owed to Muller.

C.

Finally, Fracht argues that LCI owed it indemnity based upon a claimed breach of the WWLP. To the extend that WWLP as recognized in *Ryan Stevedoring Co.* still exists in this Circuit, it has been questioned, if not wholly displaced, as the appropriate model for indemnification of cargo damage. *Rockwell Int'l Corp. v. M/V Incotrans Spirit,* 998 F.2d 316, 319 (5th Cir.1993) ("We recognize that *Ryan* indemnification continues to exist, but are reluctant to expand it beyond the personal injury/seaworthiness context from which it arose.") (citation omitted); *Bosnor, S.A. de C.V. v. Tug L.A. Barrios,* 796 F.2d 776, 785-86 (5th Cir.1986) (doubting continued vitality of the *Ryan* approach outside the personal injury context); *Bass v. Phoenix Seadrill/78, Ltd.*, 749 F.2d 1154, 1167 (5th Cir.1985) (same); *Gator Marine Serv. Towing, Inc. v. J. Ray McDermott & Co.*, 651 F.2d 1096, 1100 (5th Cir.1981) (same). Because this case is outside the personal injury/seaworthiness context, we find no basis for the application of the theory of breach of a WWLP.

Appendix A

III.

It follows that the facts of the present case do not provide any basis for a tort indemnity claim. Fracht's only cause of action is for subrogation, which is subject to the COGSA package limitation. The district court's grant of Fracht's motion for summary judgment is reversed and this case is remanded with instructions to limit LCI's liability to Fracht in accordance with the COGSA package limitation.

REVERSED and REMANDED.

APPENDIX B — ORDER AND REASONS OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA FILED JULY 19, 2004

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CIVIL ACTION

NO. 03-1396

SECTION "C" (5)

LCI SHIPHOLDINGS, INC., ET AL.

VERSUS

MULLER WEINGARTEN AG, ET AL.

ORDER AND REASONS

This matter comes before the Court on motion for summary judgment filed by LCI Shipholdings, Inc. ("LCI") and cross-motion for summary judgment filed by Fracht FWO AG "Fracht." Having considered the record, the memoranda of counsel and the law, the Court has determined that summary judgment in favor of Fracht is appropriate for the following reasons

Both motions concern the viability of the counterclaim being made by Fracht against LCI. The material facts are undisputed. Fracht is a German freight forwarder which contracted with Muller Weingarten AG ("Muller") to arrange

for the shipment of machinery from Germany. Fracht booked passage for the shipment of some presses to the United States with Forest Lines Inc. ("Forest Lines", predecessor-in-interest to LCI, through Forest Lines' agent, Herfurth & Co. Shipping GmBH "Herfurth"). Herfurth issued a datafreight receipt naming Muller as shipper and Forest Lines as carrier for the presses, which were damaged in transit due to inadequate stowage.

Allianz Versicherungs AG ("Allianz"), an insurance entity, provided coverage to Muller for cargo damage and paid the claim. As subrogee of Muller, Allianz sued Fracht in a German court, which found against Fracht in the full amount of the damages to the freight under its agreement with Muller. Fracht subsequently settled the claim. Fracht now seeks indemnity for the full amount it paid to settle the damage claim. LCI argues that Fracht's recovery is limited to the $500 per package limitation set forth in the Carriage of Goods by Sea Act, 46 U.S.C. § 1300 *et seq.* ("COGSA"), which had been incorporated into the datafreight receipt.

Fracht's argument is based on a straightforward application of contract and tort law. "[C]ontracts purporting to grant immunity from, or limitation of, liability must be strictly construed and limited to intended beneficiaries, for they not to be applied to alter the familiar rules visiting liability upon a tortfeasor for the consequences of his negligence.'" *Robert C. Herd & Co. v. Krawill Machinery Corp.*, 359 U.S. 297, 304 (1959), quoting *Boston Metals Co. v. The Winding Gulf*, __ U.S 122, 123-124 (1955) (concurring opinion). (Negligent stevedore not entitled to per-package limitation in absence of language in bill of lading indicating

that contracting parties intended to limit that liability.) Herfurth, acting as agent for Forest Lines, listed only Muller as the shipper on the datafreight receipt that incorporated the COGSA package limitation, and the datareceipt receipt itself applies only to "shipper, consignee and owner" of the goods and "holder" of the receipt. According to Fracht, therefore, there is no basis to impose the per package limitation on it.

Despite the rule that limitations are narrowly construed, LCI argues that the per package limitation in the datafreight receipt applies to all persons making any claim directly or indirectly pertaining to the cargo damage. LCI's argument is not persuasive.[1]

In its motion for summary judgment, LCI characterizes Fracht's claim as one for cargo damage, not indemnity, and argues in favor of the per package limitation because there was a "fair opportunity" to declare a higher value and because the was no qualifying deviation. It then argues that "[r]egardless of 'who' now asserts the claim for cargo damage," the per package limitation applies. (Rec. Doc. 15, p 16). This argument relies on *EMS* and *Stolt Tank.*

1. LCI returns to three cases for direct support for its argument that Fracht can be treated as a shipper even though it was not so designated on the datafreight receipt. *EMS Industrie SDA v. Polski Towarzystwo Okretowe,* 608 F.Supp. 1133 (E.D.N.Y. 1985); *Stolt Tank Containers. Inc. v. Evergreen Marine Corp.,* 1990 WL 199081 (S.D.N.Y.) and *Mediterranean Marine Lines, Inc. v. John T. Clark & Son of Md., Inc.,* 485 F.Supp. 1330 (D.Md. 1980). (Rec. Doc. 15, p. 16; Rec. Doc. 22, p. 10; Rec. Doc. 25, p. 18). These cases in themselves do not lend compelling support for LCI's argument, as dismissed hereinafter.

The Court finds these two cases distinguishable. First, neither involve an indemnity claim. In *EMS*, the issue of who is a "shipper" for purposes of the bill of lading was not even raised. That court did not discuss the contractual arrangements among the three plaintiffs, the purchaser, and two freight forwarders, who jointly argued that the per package limitation in the bill of lading did not apply because they were not afforded a "fair opportunity" to declare a higher value. The court's finding that, as to the carrier, the per package limitation applied to the three carriers is not particularly helpful. The court's determination that the packaging defendant also be limited in any contribution from the carrier to the per package limitation because it "would frustrate the statutory scheme of liability" stands without legal citation in the opinion.

The *Stolt Tank* case relies, in turn, on *E.M.S.* as authority. *Stolt Tank* involved bills of lading which provided that the carrier shall "in no event" be liable for more than $500 per package "in any action" against the carrier where the third party, Stolt, was defined as a "merchant" under the bill. That argument is not available here in the absence of a factual basis for it in the datafreight receipt. That court also found that "Stolt was to benefit from their eventual delivery to a Stolt Depot in Japan," a circumstance not argued here. *Id.*, at *5.

In LCI's reply to Fracht's opposition to its motion for summary judgment, LCI argues that Fracht's rights lie only in subrogation if Fracht is not a party to the datafreight receipt. LCI argues that "[w]hether Fracht constitutes a 'shipper' 'shipper's agent' or 'carrier'," Fracht is nevertheless

bound by the terms of the datafreight receipt because it is "functional equivalent of a shipper" as to LCI. (Rec. Doc. 22, p. 3). LCI repeats the argument that "any claim against Forest Lines is a claim subject to the terms and conditions" of the datafreight receipt" "regardless of 'who' asserts the claim, although it cites no case that so holds. (Rec. Doc. 22, pp. 3-4). LCI next undertakes an argument that a freight forwarder that does not issue a bill of lading is not a "carrier" under COGSA, and because "Fracht was Muller's agent, it was "the functional equivalent of the shipper" as to Forest Lines. LCI relies on the *Mediterranean Marine,* case in support. (Rec Doc. 22, p. 3).

Mediterranean Marine involved pre-loading damage to both the goods and the vessel. The freight forwarder there prepared the goods for shipment and delivered them to the terminal for loading. The bill of lading contained language extending the COGSA limitation to others, and there was COGSA language in the stevedoring contract and in a dock receipt. The court did find that, under those circumstances, the freight forwarder was the "agent for the shipper and therefore must be considered a 'shipper' under the bill of lading." This case does provides some authority for LCI's argument that a "shipper" can include a party not mentioned in the bill of lading, but the authority is lonesome and weak. The court's conclusion is based on a case, *Couzens Warehouse & Distributors. Inc.*, 544 F.2d 919 (7th Cir 1976), in which the court dealt with whether a public warehouseman acting as a freight forwarder without the required permit was a shipper for purposes of applicable tariffs applicable to certain rates under the Interstate Commerce Act. This Court is dealing with a case for indemnity.

Appendix B

In opposition to the cross-motion filed by Fracht, LCI again argues for the broad proposition that "[i]t makes no difference 'who' claims against LCI or 'how' that claim is characterized" and that "[t]hose who claim against LCI must do so either as one having an interest in the cargo carried under the datafreight receipt or as that person's subrogee." (Rec. Doc. 25, p. 3). LCI then raises some new arguments.

First, LCI argues that Fracht was found to be a carrier in German court only because it stipulated to that status. LCI also argues that because Fracht unsuccessfully argued in favor of being a beneficiary of the per-package limitation contained in, the datafreight receipt in Germany, it is precluded from arguing that the limitation does not apply to it as against LCI. The Court disagrees

> Judicial admissions must be distinguished from ordinary evidentiary admissions. A judicial admission is binding upon the party making it; it may not be controverted at trial or on appeal. Judicial admissions are not evidence at all but rather have the effect of withdrawing a fact from contention. Included within this category are admissions in the pleadings in the case, admissions in open court, stipulations of fact, and admissions pursuant to request to admit. Ordinary evidentiary admission, on the other hand, may be controverted or explained by the party. Within this category fall the *pleadings in another case*, superseded or withdrawn pleadings in the same case, answers to interrogatories, stipulations as

> to admissibility, as well as other statements admissible under Rule 801(d)(2).

30B Wright & Miller, Federal *Practice & Procedure* § 7026 (West) (emphasis added). This result seems logical in light of the fact that the German court did not recognize Fracht's entitlement to the per-package limitation. Had it done so, this lawsuit would not likely have been filed argues that "[i]f Fracht claims to be the 'functional equivalent of a carrier", then it constitutes a 'non-vessel operating common carrier.' (NVOCC)," which "is the functional equivalent of a shipper as to Forest Lines." (Rec Doc. 25, p. 7). Still, no case linking this argument to the applicability of the per package limitation to Fracht is provided. LCI continues with the argument that Fracht acted as agent for Muller in arranging the shipment and knew that the COGSA terms would be in the bill of lading and, therefore, if a "fair opportunity" was afforded, the per package limitation apples to Fracht. Again, no authority for application in this matter is provided. It should be noted that the datafreight shipper designation does not include the shipper's agents, and likewise there can be no serious argument that Muller was Fracht's agent in any respect, either then argues that the booking confirmation between Fracht and Herfurth was "merged" into the datafreight receipt contract of carriage between Muller and Forest Lines, which therefore binds Fracht to the per package limitation. In support of this argument, LCI cites *West India Industries, Inc. v. Tradex, Tradex Petroleum Services*, 664 F.2d 946 (5th Cir. 1981). In that case, however, the same parties that entered into the preliminary contract were listed on the bill of lading. Again, even if Fracht was acting as agent for Muller in arranging the shipment with Herfurth, there is no allegation

that Muller, listed alone as the shipper on the datafreight receipt, was ever acting as agent for Fracht. See *James N. Kirby Ltd. v. Norfolk Southern Railway Co.*, 300 F.3d 1300 (11th Cir. 2002)

LCI again argues that because Fracht is not a party to the datafreight receipt it can only sue LCI as subrogee. This time, LCI argues that tort indemnity is not available to Fracht because Fracht and Forest Lines "both share the identical basis for liability for the cargo damage in this case – namely, the vicarious liability for the statutory non-delegable duty imposed on the carrier to properly load, stow and secure the cargo (Rec Doc. 25, p. 15). However, Fracht's liability is based on its contract with Muller and, while LCI's argument is based on Forest Lines' contract with Muller, Fracht's claim against LCI is based in tort and derived by its status as carrier.[2] *Cities Service Co. v. Lee-Vac. Ltd.*, 761 F.2d 238 (5th Cir. 1985). LCI finally argues that Forest Lines does not owe a warranty of workmanlike performance to Fracht and even if it does, any claim would be a cargo claim subject to the datafreight receipt. LCI concludes with citation to the EM2 and *Stolt Tank* cases for the overriding proposition that Fracht's indemnity claim is limited by the per-package limitation defense.

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2. The Court had construed the issue raised by LCI to be not whether Fracht would be entitled to tort indemnity due to the undisputably improper stowage, only whether this liability should be limited to the COGSA per package limit.

Appendix B

The Court cannot ignore the clear guidance given by the Supreme Court in *Herd*:

> Under the common law as declared by this Court, petitioner was liable for all damages caused by its negligence unless exonerated therefrom, in whole or in part, by a constitutional rule of law. No statute has limited its liability, and it was not a party to nor a beneficiary of the contract of carriage between the shipper and the carrier, and hence its liability was not limited by that contract. It follows that petitioner's common-law liability for damages caused by its negligence was in no way limited, and the judgment below so holding was correct and must be affirmed.

Id., at 772-773. There is a greater comfort level in continuing to strictly construe contracts which limit liability, especially in a situation where, as here, the parties are sophisticated and the active fault lies with the foreign stevedore, which was retained by LCI, not Fracht.[3]

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3. In this regard, the Court finds persuasive the analysis undertaken and result reached in the two primary cases cited by Fracht, *Victoria Sales Corp. v. Emery Air Freight, Inc.*, 917 F.2d 705 (2d Cir. 1990) and *American Home Assurance. Inc. v. Internaves Shipping Corp.*, 985 F.Supp. 1154 (S.D.Fla. 1997).

Appendix B

Accordingly,

IT IS ORDERED that the motion for summary judgment filed by Shipholdings, Inc. is DENIED and the cross-motion for summary judgment filed by Fracht FWO AG is GRANTED. Counsel shall advise the Court in writing of the status of the remaining claims and/or parties within five days.

New Orleans, Louisiana, this 19th day of July, 2004.

s/ Helen G. Berrigan
HELEN G. BERRIGAN
UNITED STATES DISTRICT JUDGE

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DENYING PETITION FOR REHEARING FILED DECEMBER 6, 2005

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 04-30937

LCI SHIPHOLDINGS INC., for itself and as the successor-in-interest to Forest Lines Inc.,

Plaintiff - Counter Defendant - Appellant

v.

MULLER WEINGARTEN AG; ET AL.,

Defendants

FRACHT FWO AG,

Defendant - Counter Claimant - Appellee

Appeal from the United States District Court for the Eastern District of Louisiana, New Orleans

ON PETITION FOR REHEARING AND REHEARING EN BANC

(Opinion 11/04/05, 5 Cir., ____, ____ F.3d ____)

Appendix C

Before REAVLEY, HIGGINBOTHAM, and GARZA, Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FED. R. APP. P. and 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

* * *

ENTERED FOR THE COURT:

s/ Thomas M. Reavley
United States Circuit Judge